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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

EDDIE BERNARD NEAL,

PETITIONER

VS.

J. D. WHITE, Warden, and
THE ATTORNEY GENERAL OF
THE STATE OF ALABAMA,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

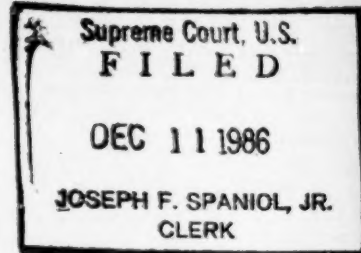
RESPONDENTS' BRIEF IN OPPOSITION
TO CERTIORARI

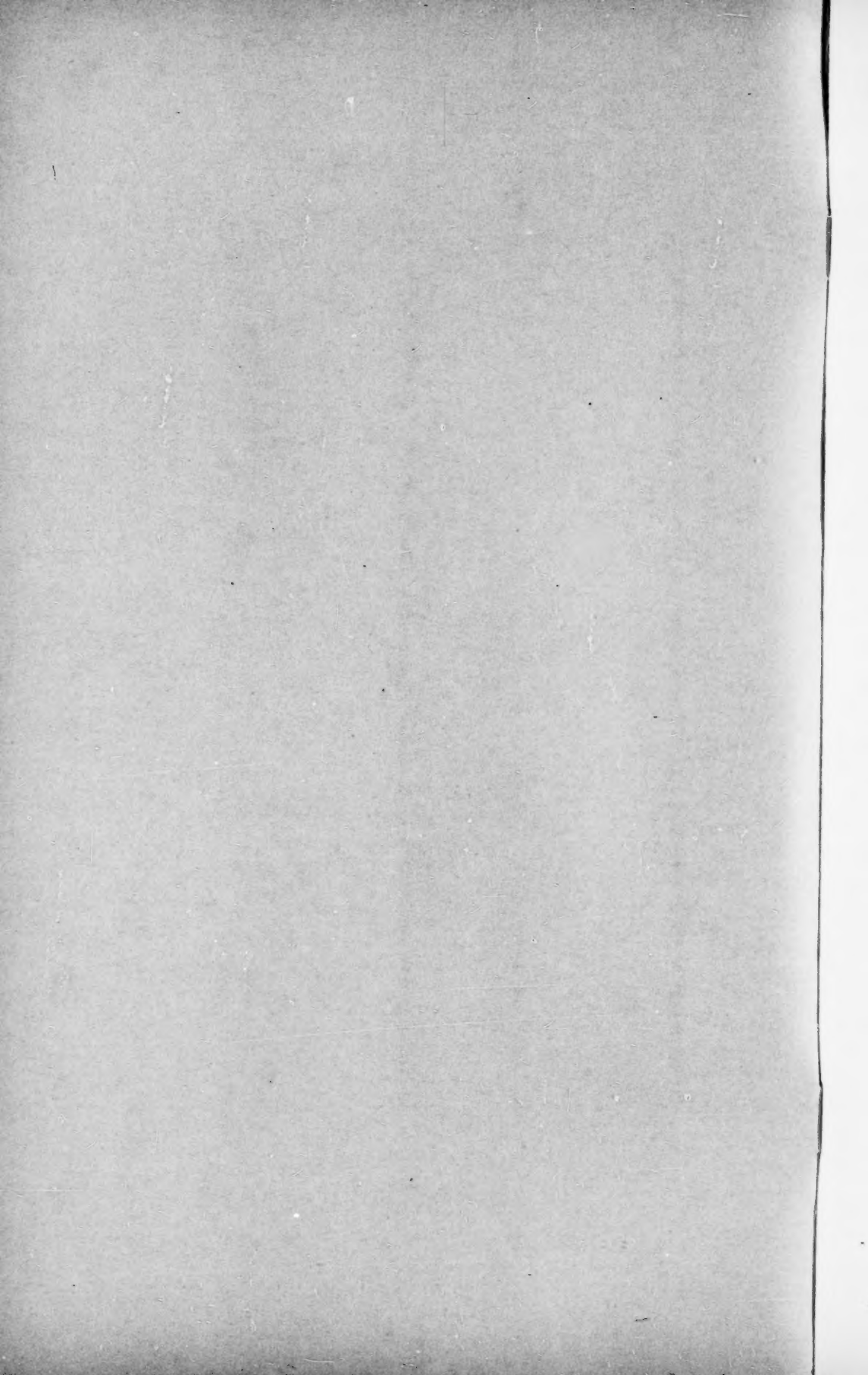
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QUESTION PRESENTED FOR REVIEW

1. Should this Court grant certiorari to review a case when the case has been remanded to the district court for a review of the sufficiency of the evidence which, if found to be insufficient, would result in a new trial for Petitioner?

2. Is an issue involving the introduction at Petitioner's trial of the testimony of a witness who testified at the Petitioner's previous trial but was for health reasons unable to be at the subsequent trial worthy of certiorari review?

PARTIES

The caption contains the names of all the parties in the Court below.

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BRIEF FOR RESPONDENTS, STATE OF ALABAMA
IN OPPOSITION TO PETITION
FOR CERTIORARI

OPINION BELOW

The opinion of the Eleventh Circuit
Court of Appeals is an unpublished
opinion.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petition addresses an issue involving the Sixth Amendment to the United States Constitution. Respondents' brief addresses 28 U.S.C. §1254.

REASONS FOR DENIAL OF THE WRIT

1. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW A CASE WHEN THE CASE HAS BEEN REMANDED TO THE DISTRICT COURT FOR A REVIEW OF THE SUFFICIENCY OF THE EVIDENCE.

On October 21, 1986, the United States Court of Appeals for the Eleventh Circuit issued as mandate their judgment in this case which affirmed in part and vacated in part the judgment of the district court below. The Eleventh Circuit remanded the issue of sufficiency of the evidence back to the district court with directions that the lower court assess the evidence introduced at trial to determine whether a rational trier of fact could have found the Petitioner guilty beyond a reasonable doubt. The lower court, on October 29, 1986, directed the Respondents to supplement their response to include the trial transcript and such was done by

Respondents on November 21, 1986. There has been no ruling by the district court on this issue at this time.

Because the district court has not yet made a determination as to the sufficiency of the evidence presented at Petitioner's trial, it would be premature for this Court to grant certiorari. The decision by the Eleventh Circuit is not a final judgment and 28 U.S.C. § 1257 precludes this Honorable Court from reviewing cases unless the petition is from a final judgment. Here, it is possible that the district court could hold that the State's evidence at Petitioner's trial was insufficient under the standard set forth in Jackson v. Virginia, 443 U.S. 307 (1979) and order the Petitioner be given a new trial or possibly released. Thus, it is conceivable that a review of this issue could moot this entire petition.

It has always been the policy of this Court that review of judgments and decrees of courts of appeals by certiorari was to be exercised sparingly, and only in cases of gravity and general importance. Except in extraordinary cases, the writ is not issued until a final decree. Hamilton-Brown Shoe Co., v. Wolf Bros. & Co., 240 U.S. 251 (1916). It has also been this Court's position to avoid "piecemeal" review of decisions and to avoid giving advisory opinions in cases where there may be no real case or controversy.

If this Court should decide to grant certiorari in this case, it will be providing piecemeal review of this case. It will review the Sixth Amendment issue raised in this petition and then, if the district court finds the evidence at trial was sufficient, will be asked to review that and other issues in a

subsequent petition. It is also possible that should this Court grant certiorari to review the issue raised in this petition, its ruling will be merely advisory in view of the possibility that the Petitioner could be ordered a new trial. The remandment of this case to the district court was not simply for the performance of a ministerial duty. The district court was ordered to make a full review of the evidence presented at trial and has in fact requested and received the entire trial transcript in light of Jackson v. Virginia, supra.

Therefore, Respondents submit that it would be premature and that this Court's scarce certiorari powers should not be squandered by reviewing the one issue raised in this petition.

II. THE ISSUE INVOLVING THE
INTRODUCTION OF A TRANSCRIPT OF
A WITNESS' TESTIMONY FROM THE
PETITIONER'S PRIOR TRIAL AT HIS
SUBSEQUENT TRIAL DUE TO ILLNESS
OF THE WITNESS IS NOT WORTHY OF
CERTIORARI REVIEW.

At Petitioner's prior trial, a police officer testified at the certain aspects of the investigation. At Petitioner's subsequent trial this witness was unavailable due to serious health problems. The trial court found that this witness was "unavailable" and the State was allowed to introduce into evidence a transcript of this witness' testimony from the prior trial. The district court, pursuant to Sumner v. Mata, 449 U.S. 539 (1981), was bound to accept the state court's findings as to this witness' disability and subsequent unavailability. Thus, this issue involved concerns a state evidentiary ruling and does not present a constitutional claim.

Moreover, it is clear that no constitutional violation occurred because of the unavailability of this witness and the introduction of his prior testimony. In Barker v. Page, 390 U.S. 719 (1960), it was held that there is an exception to an accused's constitutional right to be confronted with the witnesses against him where a witness is unavailable and has given testimony at a previous judicial proceeding against the same accused which was subject to cross-examination by that accused.

Also, in Mancusi v. Stubbs, 408 U.S. 204 (1972), it was held that the transcript of a witness' testimony at an accused's first trial bears sufficient indicia of reliability and affords the trier of fact at the accused's second trial a satisfactory basis for evaluating the truth of the prior statements so that if the witness is unavailable to testify

at the second trial the transcript of his testimony at the first trial may, consistently with the accused's constitutional right of confrontation, be admitted into evidence at the second trial, if certain requirements are met. These are: that at the first trial, which was for a serious felony and was conducted in a court of record before a jury, the accused was represented by counsel who was given an adequate opportunity to cross-examine the witness and who availed himself of that opportunity, and (2) that the accused's counsel at the second trial did not offer any new and significantly material line of cross-examination which was not at least touched upon at the first trial. Mancusi, supra.

Here, the trial record reveals that the witness' earlier testimony was basically unobjected to by Appellant.

The same counsel represented Appellant at both trials. The witness' testimony was subject to cross-examination by Appellant. The trial court stated that Witness Robbins' testimony was concerned with what he discovered at the scene of the crime and what he did with the evidence and these items had already been introduced into evidence and were "gone into at the prior trial".

The trial record further reflects that the basis for Appellant's objection to the introduction of this witness' prior testimony was that a new witness, co-defendant Jerry Lee Jones who did not testify in Appellant's first trial, was to testify in the second trial. Appellant stated that cross-examination of the unavailable witness was material to corroborate or disprove Jones' version of what occurred on the night of the murder.

This clearly was not a factor and in no way prejudiced Appellant as, while Jerry Lee Jones did take the witness stand, he did not give any testimony relative to the Appellant on the night of December 20, 1976. Therefore, the strategy of Appellant in regard to the cross-examination of the unavailable witness would not have been any different in the second trial than it was in the first trial. Therefore, Appellant's confrontation rights were not violated by the introduction of this transcript.

Furthermore, this witness would also be considered "unavailable" under the federal rules which state that a witness is unavailable if he is unable to be present or to testify at the hearing because of death or some existing physical or mental illness or infirmity. Federal Rules of Evidence, § 804(a)(4).

The conclusion reached by the Alabama courts as well as the federal courts on this issue is correct. This Court's limited certiorari powers should not be used to review a state court's evidentiary ruling.

CONCLUSION

The petition for a writ of
certiorari should be denied.

Respectfully submitted,

Charles A. Graddick

/s/ Charles A. Graddick
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ATTORNEY GENERAL OF
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Martha Gail Ingram

/s/ Martha Gail Ingram
MARTHA GAIL INGRAM
ASSISTANT ATTORNEY
GENERAL OF ALABAMA

CERTIFICATE OF SERVICE

I hereby certify that on this the
- 10th day of December, 1986, I served
three copies of the foregoing Brief and
Argument in Opposition to Petition for
Writ of Certiorari to the Eleventh
Circuit Court of Appeals on the Attorney
for the Petitioner by placing same in the
United States Mail, first class postage
prepaid and properly addressed as
follows:

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